SUPREME COURT, U.S.
FILED
MAR 2 1979
JR., CLERK

No. 78-905

In the Supreme Court of the United States

OCTOBER TERM, 1978

HORACE J. MCKENNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed by judgment order (Pet. App. 1-5).

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1978. A petition for rehearing was denied on November 6, 1978 (Pet. App. 5-7). The petition for a writ of certiorari was filed on December 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the context of this case the court correctly allowed the government to impeach its own witness through the use of a tape-recorded conversation that the witness had previously had with police officials.

2. Whether the failure to give an instruction limiting the use of this tape-recorded conversation to impeachment was reversible error where the jury had been advised of the limited purpose for which the recording had been admitted.

3. Whether the district court's instruction on the credibility of accomplice testimony denied petitioner a fair trial.

4. Whether a defendant may be convicted solely upon the uncorroborated testimony of an accomplice.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to possess counterfeit Federal Reserve Notes with intent to defraud, in violation of 18 U.S.C. 371 (Count 1), of possession of counterfeit Federal Reserve Notes with intent to defraud, in violation of 18 U.S.C. 472 (Count 2), and of transfer and delivery of counterfeit Federal Reserve Notes, in violation of 18 U.S.C. 473 (Count 3). He was sentenced to concurrent terms of five years' imprisonment on Count 1 and to six years' imprisonment on Counts 2 and 3. The court of appeals affirmed (Pet. App. 1-5).

The evidence at trial is summarized in the decision of the court of appeals (Pet. App. 1-2). It showed that petitioner contacted his cousin, Anthony Perkins, and offered him $10,000 in counterfeit Federal Reserve Notes if he would assist petitioner in passing approximately $50,000 of the counterfeit currency. Petitioner planned to have Perkins and two other individuals pass the money at various amusement parks in the Los Angeles area. Perkins accepted petitioner's proposal and spent three days in petitioner's apartment preparing the counterfeit bills for distribution. On November 26, 1975, Perkins and several associates were arrested in Disneyland after cashing the counterfeit notes.

Thereafter, Perkins agreed to become a government informant and testified as a government witness at trial. His testimony implicated petitioner in the illegal scheme (Tr. 257-268).

ARGUMENT

1. Petitioner claims (Pet. 8-11) that the district court erred by allowing the government to call a witness to testify solely for the purpose of implicating the witness with unsworn statements she had made in a prior tape-recorded conversation with police investigators.

a. Prior to trial, Joyce Turner was interviewed by two officers from the Los Angeles County Sheriff's Department (Tr. 158). During this interview, she informed the officers that she had seen petitioner in his apartment with stacks of $20 bills. This inter-

view was recorded. Turner thereafter informed the government that she would plead the Fifth Amendment rather than testify and that, if called as a witness, she would repudiate the statements she had previously given to the officers (Tr. 134-140).

At the beginning of the trial, the government obtained a grant of immunity for Turner and called her as a witness to corroborate Perkins' testimony (Tr. 134-136). When Turner took the stand, the district court cautioned her that she was now testifying under oath and "that if you give untruthful testimony that you are subject to the penalties of perjury" (Tr. 143). She replied, "Okay. I am under oath now, and I respect that * * *" (*Ibid.*). The prosecutor then asked her if she had ever seen anyone in petitioner's apartment with $20 bills. She responded, "No, I did not" (Tr. 145). To refresh the witness's recollection and to impeach this testimony, the government introduced into evidence the tape of her interview with the local police officials (Tr. 145-164).

b. There may be circumstances where the "real purpose" of calling a hostile witness is to employ an otherwise inadmissible prior inconsistent statement to impeach the witness and where doing so would deny the defendant a fair trial. *United States* v. *Morlang*, 531 F.2d 183, 188 (4th Cir. 1975);[1] see also *United States* v. *Shoupe*, 548 F.2d 636, 643 (6th Cir. 1977). But this is not such a case. Here, the

[1] In *United States* v. *Morlang*, *supra*, the government acknowledged that it knew that the witness would repudiate the prior statement at trial. 531 F.2d at 188 & n.11.

prosecutor was justified in hoping that, under oath, Turner would support rather than recant her prior statement. Once Turner was granted an immunity from prosecutive use of her testimony, it was reasonable to assume that she would testify truthfully at trial.[2] As the Second Circuit stated in *United States* v. *Burket*, 480 F.2d 568, 572 (1973), even where a witness has threatened to disavow a prior unsworn statement, the government may call the witness to "see what they would actually do under the sanctity of the oath." If their testimony under oath conflicts with the prior statement, it is then proper to employ the earlier statement to refresh the witness's recollection and, if necessary, to impeach the testimony. *Ibid.* See Fed. R. Evid. 607; *United States* v. *Rogers*, 549 F.2d 490 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); *United States* v. *Mendell*, 538 F.2d 1238 (6th Cir. 1976).[3] Any other rule would

[2] The possibility of prosecution had motivated, in part, her reluctance to testify at trial. See page 3, *supra*. If there were concern with the reasonableness of the government's hope that the witness would testify consistently with her prior statement after immunity was granted, this could have been explored in a *voir dire* proceeding. But defense counsel did not request such a proceeding at trial.

[3] Petitioner's reliance (Pet. 10) on *Bushaw* v. *United States*, 353 F.2d 477, 481 (9th Cir. 1965), cert. denied, 384 U.S. 921 (1966), *United States* v. *Miles*, 413 F.2d 34, 37 (3d Cir. 1969), *Hooks* v. *United States*, 375 F.2d 212, 214 (5th Cir. 1967), and *United States* v. *Coppola*, 479 F.2d 1153, 1158 (10th Cir. 1973), is misplaced. These cases, decided prior to the adoption of Rule 607 of the Federal Rules of Evidence, hold that a party may not impeach its own witness unless it is "surprised" by adverse testimony. Rule 607 has rejected

place "the prosecution in the untenable position of either abiding by her trial testimony or not calling her as a witness." *United States* v. *Jordano*, 521 F.2d 695, 697 (2d Cir. 1975).

2. Petitioner contends (Pet. 11-12) that he was denied a fair trial because the district court failed to instruct the jury at the close of the evidence that the taped conversation of witness Joyce Turner was to be considered for impeachment only. The court of appeals correctly held, however, that the absence of such an instruction at the close of the evidence was harmless error because (Pet. App. 3) "[t]he government, when introducing the evidence, made it clear that the purpose of the evidence was to impeach Mrs. Turner's testimony." Furthermore, in its closing argument, the government again informed the jury of the limited purpose for which the tape had been introduced, stating (Tr. 359): "Now, we introduced that tape recording in order to impeach her testimony on the stand." Defense counsel also emphasized the limited admissibility of the tape during closing argument (Tr. 381):

> The testimony of Joyce Turner. First of all, ladies and gentlemen, as I remember it, and your memory controls, that tape recording was offered for impeachment and not for the truth of the matter.

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this approach. See, *e.g.*, *United States* v. *Rogers*, *supra*, 549 F.2d at 495 n.6; *United States* v. *Mendell*, *supra*, 538 F.2d at 1238-1239.

Under these circumstances, the court of appeals properly ruled that the jury had been sufficiently informed that the tape was admitted solely for impeachment purposes and not as substantive evidence.[4] See also *Thompson* v. *United States*, 389 F.2d 37, 38 (9th Cir.), cert. denied, 391 U.S. 903 (1968).

3. Petitioner argues (Pet. 13-15) that the district court's failure to instruct the jury at the close of the evidence on the credibility of informers and accomplices deprived him of a fair trial. The court of appeals correctly concluded, however, that, while the trial court erred in failing to give such instructtions at the close of the evidence, in the context of the entire trial, the error was harmless (Pet. App. 2).

Prior to the government's presentation of its case, the district court gave preliminary instructions to the jury, including an instruction cautioning them about testimony from a government informer or a participant in the crime. The district court instructed (Tr. 28):

> You should consider the status of a witness. If the witness is an informer for the government or an accomplice or participant in the com-

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[4] *United States* v. *Gilliam*, 484 F.2d 1093 (D.C. Cir. 1973), *United States* v. *Small*, 443 F.2d 497 (3d Cir. 1971), *United States* v. *Kemp*, 504 F.2d 421 (6th Cir. 1974), and *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973), on which petitioner relies (Pet. 11-12), are therefore inapposite. In those cases, no cautionary instruction had been given and there was no indication that the jury had otherwise been informed of the limited purpose for which the evidence had been admitted.

> mission of a crime charged you should view such testimony cautiously and weigh its probative value with great care.

The court of appeals noted that this instruction correctly states the law and that it was "given at a time calculated to assist the jury in evaluating the testimony" (Pet. App. 3). The failure to repeat the instruction after the conclusion of the evidence did not prejudice petitioner[5] and thus did not constitute reversible error.[6] See *United States* v. *Hermosillo-Nanez*, 545 F.2d 1230, 1233 (9th Cir. 1976), cert. denied, 429 U.S. 1050 (1977).

4. Finally, there is no merit to petitioner's contention (Pet. 15-16) that the rule permitting the conviction of a defendant upon the uncorroborated testimony of an accomplice (see, *e.g.*, *United States* v. *Alston*, 551 F.2d 315, 319-320 (D.C. Cir. 1976)), is based on an improper reading of *Caminetti* v. *United States*, 242 U.S. 470 (1917), and *Holmgren* v. *United States*, 217 U.S. 509 (1910). It has long been settled at common law that a conviction may be had on the uncorroborated testimony of an accomplice

[5] The court of appeals noted that the defense counsel refreshed the jury's recollection of the court's instruction during his closing argument (Pet. App. 3).

[6] Petitioner's reliance (Pet. 13) on *United States* v. *Pinkney*, 551 F.2d 1241 (D.C. Cir. 1976), and *United States* v. *Alston*, 551 F.2d 315 (D.C. Cir. 1976), is misplaced. In those cases the court concluded that the defendant had been prejudiced when the trial court's failure to give a proper instruction at the close of the evidence was not cured by any other instruction.

where the evidence satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Mark Yick Hee* v. *United States*, 223 F. 732, 735 (2d Cir. 1915). There is no need for this Court to review the settled rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1979

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